IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.N.KRISHNAN

THURSDAY, THE 13TH DECEMBER 2007 / 22ND AGRAHAYANA 1929

WP(C).No. 30014 of 2007(U)

PETITIONER:

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1. BALARAMAN, KOOTTUNGALTHARAYIL
KIZHAKKATHIL, ADINADU VADAKKUM MURI,
KULASEKHARAPURAM VILLAGE, KARUNAGAPPALLY.

2. SANTHAMMA, W/O.BALARAMAN RESIDING AT
KOOTTUNGALTHARAYIL, KIZHAKKATHIL,
ADINADU VADAKKUM MURI, KULASEKHARAPURAM VILLAGE,
KARUNAGAPPALLY.

3. RAJAN, S/O.BALARAMAN, KOTTUNGALTHARAYIL
KIZHAKKATHIL, ADINADU VADAKKUM MURI,
KULASEKHARAPURAM VILLAGE, KARUNAGAPPALLY.

4. RAJESH, S/O.BALARAMAN,
KOOTTUNGALTHARAYIL KIZHAKKATHIL,
ADINADU VADAKKUM MURI, KULASEKHARAPURAM
VILLAGE, KARUNAGAPPALLY.

BY ADV. SRI.K.SUBASH CHANDRA BOSE

RESPONDENT:

VIJAYAN, S/O.MADHAVAN, KOOTTUNGAL
THARAYIL VEEDU, ADINADU VADAKKUM MURI,
KULASEKHARAPURAM VILLAGE, KARUNAGAPPALLY.

BY ADV. SRI.B.KRISHNA MANI

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 13/12/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

WP(C).No. 30014 of 2007

APPENDIX

PETITIONER'S EXHIBITS

EXT.P1- TRUE COPY OF THE PLAINT IN O.S.NO. 344/02 BEFORE THE MUNSIFF COURT KARUNAGAPPALLY

EXT.P2- TRUE COPY OF THE WRITTEN STATEMENT FILED BY THE DEFENDANTS IN O.S.NO. 344/02 BEFORE THE MUNSIFF COURT, KARUNAGAPPALLY

EXT.P3- TRUE COPY OF THE AFFIDAVIT AND PETITION IN L.A.2019/2005

EXT.P4- TRUE COPY OF THE OBJECTION FILED TO L.A.2019/05

EXT.P5- TRUE COPY OF THE ORDER IN L.A.2019/05 IN O.S.344/2002 BEFORE THE MUNSIFF COURT, KARUNAGAPPALLY DATED 28.7.2006

EXT.P6- TRUE COPY OF THE JUDGMENT IN CMA.56/06 DATED 12.7.07 BEFORE THE DISTRICT COURT, KOLLAM.

(TRUE COPY)

P.A TO JUDGE

M.N.KRISHNAN, J.

W.P.(C). NO. 30014 OF 2007

Dated this the 13th day of December, 2007

J U D G M E N T

This writ petition is preferred against the order of the District Judge, Kollam in C.M.A 56/06 whereby the said court confirmed the order of the trial court, which dismissed the application after setting aside the ex parte decree on condonation of delay of 386 days. Learned counsel for the writ petitioners would submit that there was no deliberate act, negligence or misconduct on the part of the petitioners in prosecuting the case. The suit is one for a permanent prohibitory injunction and the defendants in the suit are claiming the restrictive right of easement by prescription over the property. I am also informed that after the decree in the suit, petitioners herein have filed a suit for declaration of their easement right and it is pending as O.S. 618/05 before the very same court.

2. The principles to be borne in mind while setting aside an ex parte decree has been broadly laid down in **Sreedhara Kurup v. Mickel** [1968 KLT 599]. This court held that it is largely a matter of wise discretion to be exercised by the court bearing in mind the wholesome principle that the right of a party to be heard should be negatived only if there is gross negligence or gross carelessness and that if some steps have been taken and application for restoration has been made with some diligence and

some evidence adduced making out a sufficient cause for absence, restoration should be ordered, minor misconduct or laches being corrected by the common curative of costs. The brooding spirit of natural justice must be in the background while ascertaining whether there is sufficient cause. So, if one is able to find out that there is no gross negligence or misconduct, then an opportunity can be afforded. In this case, the very valuable right has been set up as defence and it is deposed that the defendant's clerk informed the client that he will inform them when their presence is necessary. As he did not inform that, the same resulted in the laches and therefore mercy should be shown to conduct the case on merits. The courts below found that the writ petitioners are residing hardly 4 Kms. away from the house of the Advocate and therefore it is not so easy to believe that they never have contacted the lawyer at an earlier point of time. Whatever that may be, the writ petitioners have raised valid contentions in the written statement and their right of ingress and aggress is the subject matter of the dispute. Though belatedly, they have come forward with a proper application seeking permission to conduct the case after setting aside the ex parte decree. Of course, there are laches on the part of the writ petitioners. Considering the fact that the very important civil right is involved and the conduct does not amount to gross negligence or grave misconduct, complying with the theory of principles of natural justice, I feel circumstances do exist in this case to grant an opportunity to the writ

petitioners to conduct the case on merits. But for the laches, they have to be penalised.

3. Therefore, I set aside the orders passed by the courts below by condoning the delay in filing the application and set aside the ex parte decree on payment of a cost of Rs.2,500/- to the plaintiff within a period of one month from today. If the amount is paid or deposited, the court below shall set aside the ex parte decree and restore the case to file and thereafter dispose it of along with O.S. 618/05 which also deals with the very same subject matter, as expeditiously as possible, within a period of three months from the date of first appearance of the parties before the court, after restoration.

The writ petition is disposed of accordingly.

M.N.KRISHNAN, JUDGE

vps